No. 15,905

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM DORN, JR.,
Appellant,

vs.

BALFOUR, GUTHRIE & CO., LIMITED, a corporation,
Appellee.

Appeal from the Judgment of the District Court of the Northern District of California.

Honorable Oliver D. Hamlin, Judge.

APPELLANT'S REPLY BRIEF.

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Preliminary Notes.

1. The passages in parenthesis in the last paragraph of page 7 of Appellant's Opening Brief should be deleted. We apologize to the Court that this intra-office "humor" found its way from comments on the rough draft clear into the printed brief.

2. Appellee is right in the correction made by the footnote on page 3 of Appellee's Brief.

On the merits, Appellee's Brief makes three arguments: (1) It cites the affidavits as evidence allegedly

supporting the findings. In this connection it seeks to uphold the judgment on the strength of alleged "customary" duties of a ship's husband; (2) it argues (p. 8) that "In the absence of a finding that Balfour had any control of the vessel, there is no possible basis for finding any duty toward the plaintiff; (3) it cites two United States Supreme Court decisions which are clearly not in point. Discussion of the first argument will largely answer the two others.

I.

APPELLANT'S POINTS NOT ANSWERED IN APPELLEE'S BRIEF.

Appellee does not question the rule of solidary liability in case of joint control. (Appellant's Op. Br. pp. 10-15.) It argues that the rule does not apply to the facts (Appellee's Br. pp. 8-9), but it does not question the principle of law.

Appellee seems to contest the legal principle only when it argues about "the limited functions assumed by Balfour." (Appellee's Br. pp. 3, 6.) This is answered by the rule of the Restatement, that the solidary liability exists even where the responsibility of the joint managers is unequal. (Appellant's Op. Br. pp. 10-11.)

II.

TESTIMONY QUOTED BY APPELLEE DOES NOT SUPPORT FINDING OF "NO AUTHORITY OR CONTROL".

On pages 4-7 of its brief, appellee quotes from affidavits, and also quotes Bailey's testimony, of which the essential appears on Appx. pp. i and ii of Appellant's Opening Brief, and part of Keefer's testimony.

The implication seems to be that this testimony supports the findings, regardless of the testimony quoted in the Appendix to Appellant's Brief.

But the present case is not one of conflicting evidence. All the testimony (whether by affidavits or in court) comes from the same witnesses. All these witnesses except Krag, were officers or former officers of the defendant—whether called by defendant or by plaintiff. Krag was called by defendant.

Upon this background, the quotations in Appellee's Brief—particularly the affidavits—do not sustain the findings, for three reasons.

First: The affidavits, at least, have no greater strength before the Appellate Court than before the trial Court; and the affidavits contain mere generalities, while the detailed facts are given by the passages quoted in the Appendix to Appellant's Opening Brief.

Second: The same rule applies generally where the problem is not the resolution of a conflict, but the conclusions to be drawn from uncontradicted evidence. Here the specific facts must take precedence over the generalities and conclusions on which the appellee relies.

Third: The "evidence" on which appellee relies consists merely of conclusions, which as a matter of law are valid only so far as there is factual testimony to support them. But the factual testimony is contrary.

We consider these three points in order.

A. Documentary Evidence Is Reviewed by Appellate Courts.

The rule is well settled that there are no presumptions in favor of the trial judge's findings where the case has been tried on documentary evidence (including affidavits and depositions). The same must be true to the extent that the appellee relies on affidavit evidence to sustain the findings. The rule that an Appellate Court will re-examine written evidence was stated by the Ninth Circuit in *The Natal,* 14 F. (2d) 382, 384:

> ". . . The rule that findings of fact are entitled to great weight in an appellate court is modified where, as here, they are based wholly on depositions. . . ."

Also:

The Santa Rita, 176 F. 890, 893.

Cases to the same effect from other circuits:

U. S. Corp. Latter Day Saints, 101 F. (2d) 156, 160 (CCA 10);

The Mardosak, 94 F. (2d) 339, 341 (CCA 4) citing *The Santa Rita,* 176 F. 890, supra;

Kaeser & Blair, Inc. v. Merchants' Assn., 64 F. (2d) 575, 576 (CCA 6);

Nashua Mfg. Co. v. Berenzweig, 39 F. (2d) 896, 897 (CCA 7).

B. Appellate Court Reviews Conclusions From Undisputed Evidence.

The First Circuit has applied the above rule to undisputed evidence of all kinds; and *The Natal,* 14 F. (2d) 382, supra, indicates that the same is true in the Ninth Circuit.

In *Munro v. Smith,* 259 F. 1, the First Circuit said, in reversing findings:

> (pp. 2-3) "The case must turn upon the admitted facts, the inferences therefrom, and upon the interpretation of written evidence, in considering which, of course, the District Court had no substantial advantage over this court. The usual rule of giving great weight to the conclusions of the trial judge who observed the appearance and the manner of the witnesses, is not, therefore, to any substantial degree, applicable in this case. As we are not able to adopt the views of the District Judge, it is necessary to deal in considerable detail with the evidence and the necessary inference therefrom."

The Natal, 14 F. (2d) 382, 384, says, directly after the language quoted above,

> "But we do not regard the finding of fact here as depending upon conflicting evidence or the credibility of witnesses. It rather depends upon admitted facts and the conclusions referable therefrom."

In *The Natal,* there was an affirmance but only after a reexamination of the evidence.

It is the general rule that an Appellate Court will reexamine findings which involve merely conclusions

from undisputed evidence. Compare the summary of the law given in 3 Am. Jur. 471 (Appeal & Error, sec. 902):

> "However, a finding which rests on conclusions to be drawn from undisputed evidence rather than on any conflict in the testimony, does not carry with it the same conclusiveness as a finding resting only on probative disputed facts. It is rather in the nature of a legal conclusion drawn from undisputed evidence, which, if not in accordance with the view of appellate court, can be disregarded almost as readily as a pure error of law on the part of the trial court. If the undisputed evidence admits of only one conclusion, an opposite finding will not be permitted to stand by the reviewing court."

C. Evidence on Which Appellee Relies Consists of Conclusions No Better Than Facts Which Underlie Them.

1. Appellee relies on general statements that it had no "control" or "authority" over the SS RIMAC or her operations while she was in port on the waters of San Francisco Bay.

The first quotation (answers to Interrogatories, Appellee's Br. p. 4) is ambiguous on this point. After referring generally to "services customarily performed by port husbanding agents", it says, "to arrange for berthing the vessel and to arrange for *such further services* and supplies *as might be requested* by her master or by the Republic of Peru, her owner." (Italics added.)

This identical language is repeated in the affidavit of Bailey (Appellee's Brief, foot of page 4 and top of page 5). Added to that are the broad assertions:

(p. 4) ". . . that Balfour did not at any time manage or have authority to manage the said vessel and did not have any function, activity or relationship with respect to the said vessel or her owners other than as a port agent. . . ."

(p. 5) "That port agents customarily do not have and Balfour did not have any authority or control over the vessel or her master, officers or crew or any authority or duty with respect to maintaining the vessel, her decks, winches or other equipment or keeping the same in safe condition. . . ."

But allegations of "control", "authority" or lack of them are merely conclusions from specific facts. Standing alone they do not sustain a finding; at best they are as good or as bad as the specific facts on which they are based. Compare the following cases:

Ritchie v. McMullen, 159 U.S. 235, 241:

(p. 241) "The general averments . . . in the second part, that 'said judgment was . . .' 'without any . . . authority on the part of the court to enter such judgment . . .' are but averments of legal conclusions. . . ."

Goltra v. Davis, 29 F. (2d) 257 (CCA 8):

(p. 260) "The allegations in the amended and supplemental bill that John W. Weeks, as Secretary of War, had no power or authority under the terms of the contract to terminate the same . . . are mere conclusions of law."

Pac. Employers Ins. Co. v. Hartford Acc. & Ind. Co., 228 F. (2d) 365 (CA 9):

> (p. 369) "These definitions lead us to accept the *conclusion* reached by the trial court, that *Neil had such control* of the premises that the exclusion in Pacific's policy did not come into effect" (Italics added.)

Other cases holding that "control" or "authority" result from specific facts:

U. S. v. Marshall Transport Co., 322 U.S. 31, 32-3:

> "Refiners, as the Commission found, is *controlled through ownership* of 82.6% of its outstanding common stock by Union T and Car Company, a non-carrier corporation." (Italics added.)

Universal Carloading & D Co. v. RR Ret. Bd., 71 F.S. 369, 371.

Under these authorities, vague assertions that Balfour-Guthrie "had no control" or "had no authority" can have no weight against evidence of specific facts set forth in the Appendix to Appellant's Opening Brief.

The only other evidence which apppellee cites is that of Keefer as to how often Balfour employees boarded the ship in port (Appellee's Brief, pp. 6-7). But that does not contradict the other testimony. It merely shows how often they thought it necessary to be on the boat in order to fulfill their responsibilities, as described in their other testimony. Perhaps they did not visit the boat often enough, and that is what has given rise to this case.

2. a. The testimony that appellee assumed the same duties as are "customarily" assumed by port agents means nothing until those "customary" duties are

defined. As already shown, the definition of these duties produced the testimony noted in the Appendix to Appellant's Opening Brief, together with the statement that Balfour, Guthrie handled all the Peruvian ore ships the same way. (App. Op. Br. p. 9). It is from these detailed facts that the conclusion follows that Balfour, Guthrie exercised enough authority and control while the ship was in port on San Francisco Bay to make Balfour, Guthrie jointly responsible for the safety of the longshoremen while on the vessel.

b. The detailed testimony in this case distinguishes *Romero v. International Terminal,* 142 F.S. 570, 244 F. (2d) 409, Appellee's Br. p. 11. At page 573 of the opinion the court says,

> "There was no proof adduced at the pretrial hearing of management, operation and control by Garcia except as it might arise by virtue of the agency agreement."

D. Finding of Control Does Not Underlie Other Findings—But Vice Versa.

Appellee puts the cart before the horse when it says at page 8 of its brief, "In the absence of a finding that Balfour had any control of the vessel, there is no possible basis for finding any duty to the plaintiff." As already shown, the situation is the other way around. Control or absence thereof *follows from other facts.* In this case the undisputed specific facts show joint control by the appellee and the Peruvian Government.

So also on page 8, appellee clouds the issue by a literally correct but misleading statement:

> "Surely no employee or agent is, *as such* engaged in a 'joint enterprise' with his principal so as to be liable for the principal's torts." (Italics added.)

"As such" an agent may not be engaged in a joint enterprise with his principal; but the evidence may show that he is, at least as far as third persons are concerned. And it begs the question to say "to be liable for the principal's torts." If agent and principal are working in consultation, failure in a non-contractual duty toward a third party, is not only the principal's tort, but also the agent's own tort. (*Restatement of Torts,* sec. 878. App. Op. Br. p. 10 and cases cited in Opening Brief, pp. 14-15.)

E. Cases on General Agents Not in Point.

At pages 9 and 10 of its brief, appellee cites two Supreme Court cases on general agents under standard contracts with the United States Government (*Caldarola v. Eckert,* 332 U. S. 155; *Cosmopolitan Shipping Company, Inc. v. Robert A. McAllister,* 337 U. S. 783). Neither of these concerned a port agent nor the specific management of a ship in port. Appellee makes a complete *non sequitur* when it argues (pp. 10-11): "If a *general* agent is not responsible to third parties for the vessel's condition *a fortiori,* a mere port agent is not" (Appellee's italics).

Whatever may or may not be the responsibilities of a general agent, they would not be inconsistent with holding a port agent responsible for the conditions on a vessel *while in port,* especially when the evidence

shows the port agent has assumed joint responsibility for such conditions.

Secondly, since the evidence in the present case has shown appellee's whole course of conduct with regard to the Peruvian naval vessels, conclusions drawn *under a different written contract* between the United States Government and the operators in the *Caldarola* and *McAllister* cases would not be applicable here.

Finally, neither of these two cases concerned conditions peculiar to the vessel's work while in port. The accident in *Caldarola v. Eckert,* 332 U. S. 155, occurred in port, but arose from a defective boom; i.e., part of the permanent structure of the ship. The Court held this was the sole responsibility of the owner, not of the general agent. (Contrast these facts with those of *Brady v. Roosevelt SS Co.,* 317 U. S. 545—defective rope ladder for boarding vessel from small harbor boats).

In *Cosmopolitan Shipping Co. v. McAllister,* 337 U. S. 783, a seaman caught poliomyelitis while the ship was in Chinese coastal waters or in Chinese ports. Negligence was charged in alleged failure to furnish proper treatment. It was held that under the standard contracts of the United States Government, this was the responsibility of the owner (the United States) not of the general agent. The case obviously is not parallel to the present one.

Both of the two cases cited arose under a different contract, and wholly different factual situations.

III.

CONCLUSION.

Detailed evidence spells out the relation between Balfour, Guthrie and the Republic of Peru. This evidence is uncontradicted. All of it comes either from witnesses called by the defense or by defendant's officers or retired officers called by the plaintiff. The sole question on appeal is what conclusions to draw from this uncontradicted evidence.

The detailed facts show joint management of the ship in port by appellee and the shipowners (Republic of Peru). Against this detailed testimony no weight can be given to general assertions that Balfour had "no authority" or "no control". Since the undisputed facts show joint management of the RIMAC while on the waters of San Francisco Bay, the appellee may be held solely liable for the consequences of negligence in that management. The contentions of our opening brief stand, and the judgment should be reversed as there indicated.

Dated, San Francisco, California,
August 11, 1958.

Respectfully submitted,
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